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No. 80-1553

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

ROBERT H. FENDLER, *Petitioner*,

v.

STATE OF ARIZONA, *Respondent*.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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OPINION IN THE LOWER COURT

The opinion of the Arizona Court of Appeals is reported as *State v. Fendler*, ___ Ariz. ___, 622 P.2d 23 (Ct.App. 1980).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether Rule 15.7 of the Arizona Rules of Criminal Procedure, which authorized the trial court to exclude the testimony of two defense witnesses as a sanction for the defendant's noncompliance with Rule 15.2, is unconstitutional as a violation of the Sixth and Fourteenth Amendments.

2. Whether Rule 15.2 of the Arizona Rule of Criminal Procedure, which mandates disclosure of certain aspects of a defendant's case within twenty (20) days of arraignment, violates the Fifth Amendment privilege against self-incrimination.

SUMMARY OF ARGUMENT

Respondent State of Arizona joins Petitioner Robert H. Fendler in his request that this Court grant certiorari on the issue presented in Argument II of the Petition for Writ of Certiorari concerning whether the exclusion of a defense witness as a sanction for the defendant's failure to comply with a trial court's order of disclosure violates the Sixth and Fourteenth Amendments. This Court should grant certiorari because the issue presented raises a federal question of substantial importance to both state and federal courts which has not yet been addressed by this Court. Indeed, courts at every level, including this Court, have recognized but declined to rule on this issue of the constitutionality of sanctions imposed against a defendant who fails to comply with reciprocal discovery provisions. A review of the few decisions dealing with this issue indicates a great possibility of conflict between state courts, and between state courts and federal courts. This Court should, therefore, take jurisdiction of the issue of the constitutionality of discovery sanctions imposed against defendants who fail to comply with disclosure statutes or rules before it becomes a quagmire of confusing and conflicting decisions across the country.

Respondent asks this Court to deny the Petition for Writ of Certiorari on the issue presented in Argument I concerning whether reciprocal discovery rules requiring a defendant to disclose certain aspects of his case violates the Fifth and Fourteenth Amendments. This Court has fully addressed the issue in *Williams v. Florida*, 399 U.S. 78 (1970), and *Wardius v. Oregon*, 412 U.S. 470 (1973), and Petitioner has not provided any compelling reason to re-litigate the matter.

STATEMENT OF THE FACTS

Petitioner was charged on March 7, 1977, in a seventeen count indictment with criminal conduct in connection with the

operation of several thrift institutions headquartered in Arizona. Trial commenced on October 17, 1977, on twelve counts of the indictment. The trial lasted 4 ½ months, one of the longest criminal trials in Arizona history. On February 27, 1978, the jury found Petitioner guilty of conspiracy (A.R.S. § 13-331B), failure to file a corporate tax return (A.R.S. § 43-179f), and false book entry (A.R.S. § 10-193B). In a post-trial motion, the trial court dismissed the conspiracy count. On appeal, the Arizona Court of Appeals reversed Petitioner's conviction on the tax count. Thus, Petitioner is before this Court convicted of the crime of false book entry.

The false book entry conviction stems from Petitioner's directive in 1974 to his accountant that four intangible "asset" categories be posted and capitalized in the ledger of Lincoln Thrift Association, the largest member of petitioner's 50-corporation conglomerate. The posted "assets" were over $1 million in amount, but in fact were totally fictitious and valueless. In connection with this fraudulent transaction, petitioner received a controlling interest in a Phoenix area federally insured bank called the American Bank of Commerce.

On the issue of discovery, Respondent filed its initial Notice of Disclosure pursuant to Rule 15.1 of the Arizona Rules of Criminal Procedure on March 21, 1977. When Petitioner failed to make his required reciprocal discovery, Respondent asked the trial court to issue an order to compel disclosure. On July 6, 1977, the trial court ordered Petitioner to file his disclosure by July 21, 1977. Petition failed to comply. On August 19, 1977, the trial court again ordered Petitioner to comply or face possible sanctions under Rule 15.7. Finally, on September 2, 1977, Petitioner filed a notice of disclosure listing over 1,000 names of alleged prospective witnesses, 131 of which included no addresses. On September 14, 1977, the trial court ordered Petitioner to amend his notice to include addresses. Only 25 addresses were added to the list and no address was provided for

either witnesses John Schaffer or Thomas Pierson. On October 6, 1977, the trial court granted Respondent's motion to preclude Petitioner from calling any witness whose address was not included in the Notice of Disclosure. After the presentation of the prosecution's case in chief, Petitioner presented his list of names of potential witnesses and included Schaffer and Pierson. Respondent asked the trial court to enforce its October order precluding witnesses not properly disclosed. After extensive argument on the issue, the trial court reaffirmed its prior position and precluded Schaffer and Pierson from testifying.

In affirming the trial court's decision, the Arizona Court of Appeals found it "glaringly apparent" that Petitioner "willfully failed to comply with Rule 15.2" and that his conduct was a "flagrant abuse of the rules." *State v. Fendler*, *supra*, 622 P.2d at 41. Further, the Court of Appeals ruled that Petitoner's offer of proof concerning the relevancy of the proposed witnesses' testimony was insufficient. The appellate court was also influenced by the fact that after realizing the need to call Schaffer or Pierson because of the testimony of a state witness, Petitioner waited 2 months before informing the trial court and Respondent of his intention to ask the court to modify its preclusion order. By that time, the prosecution had rested its case and any modification of the October preclusion order might well have prejudiced Respondent. *State v. Fendler*, *supra*, 622 P.2d at 42. The Court of Appeals held that Petitioner's conduct was unjustified and that the preclusion order did not prejudice him. Alternatively, the appellate court held that the overwhelming nature of the evidence against Petitioner made any error regarding the preclusion order harmless error. *Id.*

ARIZONA DISCOVERY RULES

Arizona's criminal cases are conducted under an open and reciprocal discovery scheme, as provided in Arizona Rules of

Criminal Procedure, Rule 15.[1] Rule 15.2[2] lists the disclosure elements required of a defendant. The Comments, which are helpful to an understanding of the substance of the Rule 15.2,

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1. The subheadings for Rule 15 are indicative of the nature of the Rule:

15.1 Disclosure by state
15.2 Disclosure by defendant
15.3 Depositions
15.4 General Standards
15.5 Excision and Protective Orders
15.6 Continuing Duty to Disclose
15.7 Sanctions
15.8 Non-severability

2. Rule 15.2 *Disclosure by defendant*

a. *Physical Evidence*. At any time after the filing in Superior Court of an indictment or information upon written request of the prosecutor, the defendant shall:

(1) Appear in a line-up;

(2) Speak for identification by witnesses;

(3) Be fingerprinted, palm-printed, foot-printed or voiceprinted;

(4) Pose for photographs not involving re-enactment of an event;

(5) Try on clothing;

(6) Permit the taking of samples of his hair, blood, saliva, urine or other specified materials which involve no unreasonable intrusions of his body;

(7) Provide specimens of his handwriting; or

(8) Submit to a reasonable physical or medical inspection of his body, provided such inspection does not include psychiatric or psychological examination;

state that it is intended that the Notice of Defenses, required by Rule 15.2(b), be a broad disclosure of the defendant's case. The defendant is not required to raise all of the defenses listed in his

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In connection with the particular crime with which he is charged. He shall be entitled to the presence of counsel at the taking of such evidence. This rule shall supplement and not limit any other procedures established by law.

b. *Notice of Defenses.* Within 20 days after the arraignment in Superior Court, the defendant shall provide the prosecutor with a written notice specifying all defenses as to which he will introduce evidence at trial, including, but not limited to, alibi, insanity, self-defense, entrapment, impotency, marriage, insufficiency of a prior conviction, mistaken identity, and good character. The notice shall specify for each defense the persons, including the defendant himself, whom he will call as witnesses at trial in support thereof. It may be signed by either the defendant or his counsel, and shall be filed with the court.

c. *Disclosures by Defendant.* Simultaneously with the notice of defenses submitted under Rule 15.2(b), the defendant shall make available to the prosecutor for examination and reproduction:

(1) The names and addresses of all persons, other than the defendant himself, whom he will call as witnesses at trial, together with all statements made by them in connection with the particular case;

(2) The names and addresses of experts whom he will call at trial, together with the results of his physical examinations and of scientific tests, experiments or comparisons, including all written reports and statements, made by them in connection with the particular case; and

(3) A list of all papers, documents, photographs and other tangible objects which he will use at trial.

d. *Additional Disclosure Upon Request and Specification.* The defendant upon written request, shall make available to the prosecutor for examination, testing, and reproduction any specified items contained in the list submitted under Rule 15.2(c)(3).

Notice of Defenses nor is he required to call all of the witnesses listed, and no comment is permitted on his failure to raise a defense or call a witness unless the trial court determines he abused the rules. A defendant is not required to disclose his own testimony, only the defense to be asserted or the element of the offenses to be attacked. He can argue deficiencies in the state's case without any prior disclosure.

Arizona's Rule 15 closely parallels Federal Rules of Criminal Procedure, Rule 16. As stated in the Advisory Committee Note to Rule 16:

> [B]roader discovery by both the defense and the prosecution will contribute to the fair and efficient administration of criminal justice by aiding in informed plea negotiations, by minimizing the undesirable effect of surprise at trial, and by otherwise contributing to an accurate determination of the issue of guilt or innocence . . . .

This is also the ground upon which the American Bar Association Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) unanimously recommended broader discovery.

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e. *Extent of Defendant's Duty to Obtain Information.* The defendant's obligation under this rule extends to material and information within the possession or control of the defendant, his attorneys and agents.

f. *Disclosure by Order of the Court.* Upon motion of the prosecutor showing that he has substantial need in the preparation of his case for additional material or information not otherwise covered by Rule 15.2, that he is unable without undue hardship to obtain the substantial equivalent by other means, and that disclosure thereof will not violate the defendant's constitutional rights, the court in its discretion may order any person to make such material or information available to him. The court may, upon request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

The Arizona Supreme Court upheld the constitutionality of Rule 15.2 in *State v. Talley*, 112 Ariz. 268, 540 P.2d 1249 (1975). In *State v. Lawrence*, 112 Ariz. 20, 536 P.2d 1038 (1975), the Arizona Supreme Court said of Rule 15:

> The underlying principle of Rule 15 is adequate notification to the opposition of one's case-in-chief in return for reciprocal discovery so that undue delay and surprise may be avoided at trial by both sides. *The rule to be effective, must be applied with equal force to both the prosecution and the defendant.* Indeed, Rule 15.8 recognized that if Rule 15.2(b) is unenforceable then 15.1(a)(1)(b) and (c) is null and void.

112 Ariz. at 22, 536 P.2d at 1040 (emphasis added).

The preclusion sanction of Rule 15.7 has been upheld by the Arizona Supreme Court in *State v. Smith*, 123 Ariz. 243, 599 P.2d 199 (1979), and *State v. Fierro*, 124 Ariz. 182, 603 P.2d 74 (1979). In *Smith* the Court held that, before a trial court precludes either party's witnesses as a discovery sanction, the court must make an inquiry into the surrounding circumstances to determine if less stringent sanctions can be used. The trial court was instructed to consider the importance of the precluded witness to the proponent's case, the level of surprise or prejudice to the opposing party, whether the discovery violation was motivated by bad faith or willfulness, and any other relevant circumstances. In *State v. Fendler*, *supra*, the Court of Appeals did not rule on the issue whether the trial court held an adequate hearing before precluding witnesses Schaffer and Pierson because it held that the doctrine expounded in *Smith* would not be applied retroactively.

ARGUMENT

I. THE SUPREME COURT SHOULD GRANT A WRIT OF CERTIORARI ON THE ISSUE WHETHER A PRECLUSION SANCTION IMPOSED AGAINST A NON-COMPLYING DEFENDANT VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS.

A. *The Issue Presented Raises a Federal Question of Importance to Both Federal and State Courts.*

In two footnotes in two separate opinions, *Williams v. Florida*, 399 U.S. 78, n. 14 (1970) and *Wardius v. Oregon*, 412 U.S. 470, n. 4 (1973), the Supreme Court recognized the issue of the constitutionality of the imposition of sanctions against a defendant for failure to comply with discovery provisions, but declined to rule on the question since it had not been properly before the Court. The Court's recognition and avoidance has been followed by both federal courts and state courts, resulting in a relative dearth of case law on the issue. *See Cox v. Wyrick*, ___ F.2d ___ (8th Cir., Slip Opinion No. 80-1462, filed Feb. 25, 1981); *Robbins v. Cardwell*, 618 F.2d 581 at 583 and n. 4 (9th Cir. 1980); *Ronson v. Commissioner of Cor. of State of N.Y.*, 604 F.2d 176, n. 5 (2d Cir. 1979); *Commonwealth v. Edgerly*, 361 N.E.2d 1289, 1292 (Mass. 1977); *State v. Wolfe*, 542 P.2d 482, 485 (Ore. 1975); *State v. Nelson*, 545 P.2d 36, 38 (Wash.App. 1975). The question whether the Sixth Amendment is violated by precluding a witness because of a defendant's failure to comply with reciprocal discovery provisions is clearly and properly before the Supreme Court in the present case.

The importance of the issue presented stems from the fact that a cursory review of statutes and court rules discloses that the Federal Rules of Criminal Procedure and approximately 27 states have some form of reciprocal discovery provisions and the Federal Rules and 25 of these states allow a preclusion

sanction.[3] The two states that do not specifically include a preclusion sanction, Alaska and Idaho, leave all sanctions, which presumably includes preclusion, to the discretion of the trial court. Montana's and Wisconsin's primary sanction is preclusion.

These provisions were enacted in reaction to the decisions in *Williams* and *Wardius*, and have been repeatedly utilized in the absence of any guidelines from this Court. State courts and federal courts have proceeded under the assumption that reciprocal discovery provisions are constitutional under the reasoning of the *Williams* and *Wardius* opinions. *See State v. Talley*, 112 Ariz. 268, 540 P.2d 1249 (1975); *State ex rel Keller*

3.

Alaska	Rules of Crim. Pro., Rule 16(e)
Arizona	17A A.R.S. Rules of Crim. Pro., Rule 15.7
Arkansas	Rules of Crim. Pro., Rule 19.7
Colorado	Colo. R. Crim. P. Rule 16(g)
Florida	West's FSA Rules of Crim. Pro., Rule 3.220
Georgia	Code 27-1302
Illinois	Supreme Court Rules, Rule 413, SHA h. l10 A. 114.13
Idaho	Rules of Crim. Pro., Rule 16(g)
Kansas	KSA 22-3212(7)
Kentucky	Rules of Crim. Pro., Rule 7.24
Missouri	VAMR Crim. Rules 25.16
Massachusetts	Rules of Crim. Pro., Rule 14(c)
Montana	Montana Code Ann. § 46-15-302(b)
Nebraska	Rev. Stat. Neb. 1943 29-1919
New Mexico	Rules of Crim. Pro., Rule 30
New Jersey	Crim Rule 3.13-3(F)
New York	CPL 240.70
North Carolina	GS 15A-910
North Dakota	Rules of Crim. Pro., Rule 16(g)
Oregon	ORS 135.865
Pennsylvania	Pa.R.Crim.P., Rule 305(E)
South Dakota	Rules of Crim. Pro., Rule 16(d)(2)
United States	18 USC Federal Rules of Criminal Procedure, Rule 16(d)(2)

v. Criminal Ct. of Marion Cty., 317 N.E.2d 433 (Ind. 1974); *State v. Richardson*, 598 S.W.2d 176 (Mo.App. 1980); *State v. Nelson*, 545 P.2d 36 (Wash.App. 1975). State courts, faced with the issue of the constitutionality of sanctions against a defendant, have concluded that, since this Court condones reciprocal discovery and because the only method of effectuating the reciprocity of these provisions is to enforce them reciprocally, sanctions imposed against a recalcitrant defendant must be constitutional. *See State v. Fierro*, 124 Ariz. 182, 186, 602 P.2d 74, 80 (1979); *People v. Copicotto*, 428 N.Y.S.2d 649, 406 N.E.2d 465 (1980); *State v. Umfleet*, 587 S.W.2d 612 (Mo.App. 1979); *Ottinger v. State*, 370 N.E.2d 912 (Ind.App. 1977). Respondent requests this Court to grant certiorari on the issue presented for the benefit of the State of Arizona, the federal courts, and the various other state courts so that each jurisdiction will know what means are available to enforce its discovery provision and determine whether revisions are required in either substance or implementation of its discovery provision.[4]

Utah	Rev. Stat. Neb. 1943 29-1919
Vermont	Rules of Crim. Pro., Rule 16.2
Virginia	Code of Virginia SS 3A
Wisconsin	WSA SS 971.23

This list does not include notice of alibi and insanity defense provisions, as found, for example, at 18 USCA Federal Rules of Criminal Procedure, Rule 12. Some of these states listed have rules or statutes which incorporate the alibi and insanity defense notice with the broader discovery provisions. *See* 17A A.R.S. Rules of Criminal Procedure, Rule 15.2(b). There are other states not listed here which have notice of alibi provisions which include preclusion as a sanction for failure to comply. See Mich. Stat. Ann. 28-1044. Many of the states not listed here provide a defendant only limited discovery to cover only *Brady* and *Jencks* material. *See* West. Va. Code ss 62-1B-2.

4. *See* Ariz. Rules of Crim. Pro. Rule 15.8, for example, which nullifies Rule 15.1(a)(1), (b), and (c) if Rule 15.2(b) or (c) is ruled unenforceable.

B. *This Court Should Grant Certiorari On The Issue Presented Because There Is A Conflict Of Decisions And A Potential Of An Even Greater Conflict.*

As stated earlier, several state courts, including Arizona, have upheld the constitutionality of imposing a preclusion sanction against a non-complying defendant. *See State v. Fierro*, 124 Ariz. 182, 186, 602 P.2d 74, 80 (1979); *People v. Copicotto*, 428 N.Y.S.2d 649, 406 N.E.2d 465 (1980); *State v. Umfleet*, 587 S.W.2d 612 (Mo.App., 1979); *Ottinger v. State*, 370 N.E.2d 912 (Ind.App., 1977). These state court decisions were recently contradicted by the Fifth Circuit Court of Appeals in *U.S. v. Davis*, 639 F.2d 239 (5th Cir. 1981), where the appellate court reversed the trial court's decision to exclude two defense witnesses because of the defendant's failure to comply with a disclosure order.

In *Davis*, the Court of Appeals held that the compulsory process clause of the Sixth Amendment forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants. The trial court precluded the two defense witnesses under Federal Rules of Criminal Procedure, Rule 16(d)(2). The degree of and motivation for the noncompliance is not stated in the record. The Court of Appeals based its decision on an analogy to the unconstitutionality of excluding a defense witness who violates a sequestration order, citing *Holder v. U.S.*, 150 U.S. 91 (1893), and *Braswell v. Wainwright*, 463 F.2d 1148 (5th Cir. 1972).

Besides confirming the lack of more pertinent and recent case law on the issue, the impact of the *Davis* opinion is uncertain. The case arose from a challenge to the Federal Rules of Criminal Procedure, yet the Circuit Court's decision is in terms of a general constitutional prohibition. It is unclear whether the ruling affects the sanction provisions of the Florida, Georgia and Texas reciprocal discovery rules. The Department of Justice has decided not to appeal the *Davis* decision.

Because the various state court decisions upholding preclusion sanctions on constitutional grounds conflict with the Fifth Circuit's decision in *U.S. v. Davis*, there is a need for this Court to speak on the issue. This need is intensified by the fact that more circuit courts of appeal and state courts are sure to be faced with similar defense challenges in the near future.

Further complicating the question is the possibility of another federal or state court rejecting the *Davis* court's reliance on the sequestration analogy and instead referring to case law dealing with the notice of alibi provisions of Federal Rules of Criminal Procedure, Rule 12.1. There are several federal cases upholding the preclusion of a defense alibi witness because of a defendant's failure to comply with Rule 12.1. *See U.S. v. Fitts*, 576 F.2d 837 (8th Cir. 1978); *U.S. v. White*, 583 F.2d 899 (6th Cir. 1978); *U.S. v. Barron*, 575 F.2d 752 (9th Cir. 1978); *U.S. v. Pulvirenti*, 408 F.Supp. 12 (D.Mich. 1976).

Respondent contends that, until the Supreme Court takes jurisdiction of the question of the constitutionality of the imposition of sanctions against a non-complying defendant, courts on every level will be confused as to the state of the law on the issue. Respondent, therefore, respectfully requests that this Court grant certiorari on Argument II of the Petition for Writ of Certiorari.

II. THE SUPREME COURT SHOULD DENY CERTIORARI ON THE ISSUE WHETHER REQUIRING A DEFENDANT TO DISCLOSE CERTAIN ASPECTS OF HIS CASE VIOLATES THE FIFTH AND FOURTEENTH AMENDEMENTS.

Petitioner claims his Fifth Amendment privilege against self incrimination was infringed because Arizona Rules of Criminal Procedure Rule 15.2 required him to list himself as a witness and disclose other aspects of his case. A similar challenge was made before this Court in *Williams v. Florida*, 399 U.S. 78 (1970), a case dealing with a defendant required to provide pre-trial notice of an alibi defense, including a list of witnesses. In the

opinion authored by Justice White, this Court held that, since no constitutional infringement was caused by a defendant having to decide to testify or present a defense during trial, a rule which merely accelerates the timing of the disclosure is not constitutionally impermissible. *Williams v. Florida*, *supra*, 399 U.S. at 84-86.

Although reversing the conviction because the discovery provision involved was not reciprocal, the Supreme Court reaffirmed the *Williams* decision in *Wardius v. Oregon*, 412 U.S. 470 (1973.). The Court in *Wardius* affirmed a state's right to experiment with systems of broad discovery designed to achieve the goals of providing both parties the maximum possible amount of information with which to prepare their cases, thereby reducing the possibility of surprise at trial. The growth of such discovery devices, the Court ruled, was a "salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system." *Wardius v. Oregon*, *supra*, 412 U.S. at 474-75.

Analogous to the situation in *Williams*, Petitioner was not required to assert any particular defense nor was he precluded from later abandoning any defense noticed or changing his mind about whether to testify.[5] The decision of which defenses to assert and whether to testify was left to Petitioner's unfettered choice. See *Williams v. Florida*, *supra*, 399 U.S. at 86. The fact that Rule 15.2 required Petitioner to accelerate his decision on these issues so that he could file a Notice of Defenses (ostensibly) 20 days after arraignment did not violate his Fifth Amendment privilege. *See Williams v. Florida*, *supra*, 399 U.S. at 86. Since Petitioner has presented no new ground of error nor any compelling reason to re-litigate *Williams* and

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5. Indeed, a prosecutor is forbidden to comment on a defendant's failure to testify by this Court's decision in *Griffith v. California*, 380 U.S. 609 (1965).

Wardius, Respondent respectfully asks this Court to deny a writ of certiorari on Petitioner's claim that Rule 15.2 violates the Fifth and Fourteenth Amendments.

CONCLUSION

For the reasons stated herein, it is respectfully requested that this Court grant the Petition For Writ Of Certiorari on the Sixth Amendment issue concerning the preclusion of defense witnesses, but deny the Petition For Writ Of Certiorari with respect to the Fifth Amendment claim relating to the constitutionality of requiring disclosure of certain aspects of the defense case.

Respectfully submitted.

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